No. 90-1802

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

NATIONWIDE MUTUAL INSURANCE COMPANY,
NATIONWIDE MUTUAL FIRE INSURANCE COMPANY, and
NATIONWIDE LIFE INSURANCE COMPANY,
Petitioners,

v.

ROBERT T. DARDEN,
Respondent.

On Writ Of Certiorari
To The United States Court
Of Appeals For The Fourth Circuit

REPLY BRIEF FOR PETITIONERS

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PARTIES TO THE PROCEEDING

The statement provided pursuant to Rule 29.1 in Petitioner's Brief at page ii is currently accurate and requires no amendment.

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REPLY BRIEF FOR PETITIONERS

ARGUMENT

1. Darden Mischaracterizes the Test of Employee Status at Common Law and the Test Applied by the Court Below.

Respondent Robert T. Darden ("Darden") claims that the common law test (1) leads to the conclusion that he was Nationwide's employee (Respondent's Brief at 21-23) and (2) "correlates in relevant respects" with the test applied by the Fourth Circuit

in this case. (*Id.* at 40-43) Darden can make these claims only by mischaracterizing both tests.

Darden pretends that the common law test turns on whether a provider of services has enough bargaining power to assert "control over the terms of [his] agreemen[t]" with the hiring party. (Respondent's Brief at 23, 42) That is *not* the common law test. Instead of asking whether the service provider controlled the terms of the agreement, the common law asks whether the hiring party has the "right to *control the manner and means by which the [desired result] is accomplished.*" *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52 (1989) (emphasis added).[1] *Cf.* Restatement (Second) of Agency § 220 cmt. e (1958) ("Those rendering service but retaining control over the manner of doing it are not servants.").

Darden attempts to find support in *NLRB v. United Insurance Co.*, 390 U.S. 254 (1968), but that decision only demonstrates the error of his position. As this Court observed, the collection agents in *United Insurance* "d[id] not have the independence, nor [were] they allowed the initiative and decision-making authority, normally associated with an independent contractor." *Id.* at 258. Because the agents worked primarily away from the company's office and set their own days and hours of work, the Court closely examined "the total factual context," a variety of

[1] Not surprisingly, Darden never addresses the application of the common law test by the district court, which found that he "was an independent contractor and not an employee" (Pet. App. 50a), or by the court of appeals, which agreed that he "probably would not qualify as an employee" (Pet. App. 39a) under the common law test.

circumstances suggesting that the insurance company closely supervised the manner in which the agents worked.[2] *See id.* at 258-59. The Court then observed (in the passage Darden quotes out of context) that the significance of those circumstances was best summed up by the fact that the agents were told to resign if they declined to follow a uniform plan dictated by the company for the handling of its business in every location. *Id.* at 259. (Darden, by contrast, had an express contract right to exercise independent judgment in running his agency (JA 8), and the district court found that he "was not required to incorporate the suggestions that [Nationwide] made." (Pet. App. 49a))

Darden correctly notes that ownership of the place of work and tools of the trade are relevant considerations under the common law test;[3] he compounds his earlier error, however, when he attempts to bend these considerations to work in his favor. Without pausing to note that he owned the building in which he and the employees he hired worked (Pet. App.

[2] The Court observed, *inter alia*, that the agents (whose "main job" was to collect premiums from policyholders) did not operate their own independent businesses, had no prior experience, were "trained by company supervisory personnel," did business "with considerable assistance and guidance" from the company's managers, and worked pursuant to a commission plan through which the company unilaterally promulgated and changed the terms and conditions under which they worked. *NLRB v. United Ins. Co.*, 390 U.S. 254, 259 (1968).

[3] As *Community for Creative Non-Violence* v. *Reid*, 490 U.S. 730 (1989) illustrates, a worker's ownership of the place and tools of work may make close supervision "practicably impossible" and thus supports a finding that the worker is an independent contractor under the common law. *Id.* at 752.

39a), Darden asserts that Nationwide "owned" his agency's policy expirations (Respondent's Brief at 43), as if Nationwide had an exclusive right to solicit future business from Darden's clientele when their policies came due for renewal or expiration. That assertion is false. Under the agreement between Darden and Nationwide, neither party held such an exclusive right: Nationwide retained the right to solicit its policyholders and thus to compete with Darden for their future business (JA 11, ¶ 10), just as Darden could (and did) compete with Nationwide for that business if he considered it more valuable than the compensation Nationwide agreed to pay if he refrained from so doing. (*See* JA 11-18, ¶ 11; JA 51)[4]

Finally, Darden characterizes the Fourth Circuit's test as focusing on "whether Nationwide . . . created a reasonable expectation . . . that benefits would be paid to [Darden]" and thus as protecting "expectations of the parties." (Respondent's Brief at 44) Far from protecting the parties' expectations, however, the Fourth Circuit *defeated* them. It expressly directed the district court to disregard the fact that "Darden's

[4] Darden's assertion that Nationwide could prevent him from competing by enforcing a restrictive covenant in state court (Respondent's Brief at 38) is false. By its terms, the restrictive covenant in Darden's agreement ceased to apply after his fifth year as a Nationwide agent (JA 18-19, ¶ 12), and Darden was a Nationwide agent for eighteen years. (*See* Pet. App. 33a) After the fifth year, the contract permitted Darden to solicit Nationwide policyholders but offered him compensation (including the Deferred Compensation Incentive Credits in issue here) if he refrained from doing so. (JA 17, ¶ 11) At trial, Darden expressly acknowledged that this compensation was offered as a "surrogate" for policy expirations and was of "rough[ly] equivalent . . . value." (Tr. 70)

expectations were limited . . . by the agency agreement's provision, present from the outset, that accrued benefits would be forfeited if Darden were to compete with Nationwide following the termination of his agency relationship." (Pet. App. 42a n.7) Without ever mentioning this aspect of the Fourth Circuit's analysis, Darden urges this Court to adopt a test of employee status based on expectations that could not reasonably exist.

2. Darden's Arguments Do Not Overcome the Fundamental Principle that Congressional Intent Governs Statutory Interpretation.

The Respondent's Brief nowhere asserts that Congress intended the term "employee" to have a broader meaning in the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* (1988) ("ERISA") than the settled meaning of that term at common law. Instead, Darden infers from the absence of an express statutory reference to the common law standard (Respondent's Brief at 28-29) that "Congress left to the courts" the determination of ERISA's reach. (*Id.* at 44-45) This reasoning is directly contrary to the interpretive principle this Court unanimously reaffirmed in *Reid*: Courts must infer that Congress intended to incorporate the common law definition of "employee" *unless the statute dictates otherwise*. 490 U.S. at 739-40.

Darden does not even acknowledge, let alone respond to, this aspect of the Court's opinion. He does, however, attempt to distinguish *Reid* by noting that the statute in that case (1) did not define the term "employee," (2) had a legislative history "reflecting a compromise of conflicting views," and (3) did not involve what Darden calls (without defining) "reme-

dial social legislation." (Respondent's Brief at 29-30) None of these purported distinctions makes a difference.

How the circular definition of "employee" in ERISA as "any individual employed by an employer" is supposed to distinguish it from a statute with no definition is neither apparent nor explained in Darden's brief. It is clear, however, that on the inquiry *Reid* prescribes—whether Congress expressed an intent to depart from the common law meaning—the definition of "employee" in ERISA will not bear the weight Darden puts on it. Nor does the legislative history of ERISA reflect any intent to depart from the common law definition, as explained in Petitioner's Brief at 15, and as the lack of any reference to the legislative history of ERISA in Respondent's Brief confirms.

The final distinction Darden offers—the remedial purpose he sees in ERISA—rests on reasoning that Congress has twice repudiated. As Darden points out (Respondent's Brief at 26-27, 30), this Court concluded that the purposes of several New Deal statutes required a broader definition of "employee" than the one supplied by common law. *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 120-21 (1944) (defining "employee" for purposes of National Labor Relations Act); *United States v. Silk*, 331 U.S. 704, 713-14 (1947) (defining "employee" for purposes of Social Security Act). Darden fails to acknowledge, however, that Congress responded to these decisions by amending the statutes to restore the common law definition it originally intended. (*See* Petitioner's Brief at 20-23) Viewed in the context of history, *Silk* and *Hearst* only confirm that the ordinary meaning of "employee" does not change simply because it appears in

a remedial statute and that Congress actually does intend to incorporate the common law definition if it does not specifically express a contrary intent.

The only other decision Darden relies upon, *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947), is consistent with Congress' historical use of the common law meaning in statutes that do not dictate otherwise. In *Rutherford*, this Court applied the expansive definition of "employee" that it had previously interpreted the Fair Labor Standards Act as requiring, not merely because Congress sought to achieve a remedial social purpose, but because the Court determined that Congress gave the term "employ" a particularly broad definition in the statute and the legislative history reflected an intent to use "employee" more broadly than in any prior federal statute. 331 U.S. at 728; *United States v. Rosenwasser*, 323 U.S. 360, 363 n.3 (1945).

Unable to deal with the decisions on which he relies in their historical context, Darden invites this Court to republish past decisions that Congress chose to alter. Indeed, although Darden does not acknowledge the Congressional reaction to *Silk* and *Hearst*, he ultimately advocates "case-by-case" judicial lawmaking, subject to Congressional repudiation, as the preferred method of expounding the meaning of "employee" in ERISA. (Respondent's Brief at 45) This Court's proper function is not to impose the burden of correction on Congress, but to interpret the statute already enacted. Darden's argument thus ignores not only the interpretive principle unanimously reaffirmed in *Reid*, but also the limited nature of judicial authority when the meaning of a federal statute is in issue.

3. Darden's Own Authorities Defeat His Argument that a "Functional Approach" to ERISA Requires Abandonment of the Settled Meaning of "Employee" at Common Law.

Darden argues that ERISA must be interpreted in the manner that best serves the purpose for which it was enacted (Respondent's Brief at 31-33, citing *Massachusetts v. Morash*, 490 U.S. 107 (1989), *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987), and *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989)), and then claims (without further argument) that two opinion letters of the Department of Labor show that the common law definition of "employee" would frustrate that purpose. (Respondent's Brief at 34-35, citing Op. Ltrs. No. 77-75A (Sept. 21, 1977) and No. 91-17A (Apr. 5, 1991)) His argument reads too selectively, however, from the authorities that are supposed to support it.

Although this Court considered the purpose of ERISA in *Morash*, *Pilot Life*, and *Firestone*, those decisions do not suggest that purpose takes precedence over the settled meaning of the words of the statute. The Court did not look beyond the text of the pertinent provision in *Morash* until it determined that the text did not resolve the issue, 490 U.S. at 114-15, and even then the Court reasoned by analogy to other provisions of ERISA in order to determine the intent of Congress. *Id.* at 115-16. In *Pilot Life*, the Court gave effect to the "common-sense understanding" of the term it interpreted. 481 U.S. at 57.[5]

[5] That the Court also observed in *Pilot Life* that the text and history of closely related statutory provisions supported its interpretation does not suggest that "the object and policy of the whole law" (Respondent's Brief at 33) could have justified interpreting the statute contrary to the common-sense understanding of its terms. On the contrary, this Court has repeatedly observed that, where Congress' intent can be determined through natural reading of ERISA's terms or history, policy arguments should be directed to Congress and not to this Court. *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 551 (1988); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 747 (1985); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 521 (1981).

Darden, by contrast, urges departure from the common sense distinction between employees and independent contractors that is captured by the common law test. (*See* Petitioner's Brief at 25)

Firestone affirmatively refutes Darden's claim. Seizing upon language in a section of the opinion on an issue not addressed by the statute, Darden fails to note that the Court also reversed an interpretation of the term "participant" because the court of appeals "stray[ed] far from the [pertinent] statutory language." 489 U.S. at 117. Instead of engaging in the policy analysis Darden advocates, the Court interpreted ERISA according to the "natural" and "conventional" meaning of the words used by Congress, *id.* at 117-18, and then rejected the argument that doing so would thwart the purpose of the statute, *id.* at 118.

The two opinion letters of the Department of Labor that Darden relies on lend no more support to his arguments than the decisions of this Court discussed above. Neither of the letters adopted the novel test of employment status Darden advocates. In fact, the most recent letter applies the common law test, and the earlier one states an interpretation of ERISA that the United States no longer defends.

The 1977 letter states that "the term 'employee' . . . should be interpreted not according to technical concepts derived from the common law of agency, but in the light of the protective purposes of ERISA," Op. Ltr. No. 77-75A at 1, and then suggests that *any* worker who participates in an employee benefit plan with "potential for abuse" would be deemed an "employee" under ERISA. *Id.* at 2. In addition, the letter observes that the Federal Insurance Contributions Act, 26 U.S.C. § 3121 *et seq.* (1988) ("FICA") specifically includes full-time life insurance salesmen in its definition of "employee,"[6] and states that the Department of Labor intended to interpret the term at least as broadly in ERISA as it had been used there. *Id.* at 2.

The United States concedes that this aspect of the 1977 opinion letter is incompatible with *Reid* (Brief of United States as *Amicus Curiae* at 18 n.13), and in any event, the Department of Labor no longer interprets ERISA as it did in that letter. The Labor Department's most recent pronouncement, Opinion Letter 91-17A, expressly embraces the common law test, stating that the existence of an employer-employee relationship "will be determined by applying

[6] FICA defines "employee" as "any individual who, under the usual common law rules . . . has the status of an employee," 26 U.S.C. § 3121(d)(2), plus several specifically identified classes of workers who are deemed to be employees regardless of their common law status. *Id.* § 3121(d)(1), (d)(3). Full-time life insurance salesmen are deemed to be employees regardless of their status under the common law rule, *id.* § 3121(d)(3)(B); other insurance salesmen, like Darden, are employees under FICA only if they satisfy the common law test. *See* 26 C.F.R. § 31.3121(d)-1(d)(3)(ii) (1991).

common law principles, taking into account the remedial purposes of ERISA." *Id.* at 2-3.[7]

4. Darden's Claim that the Common Law Test Is Suitable Only for Issues of Vicarious Liability Conflicts with Use of the Test to Protect "Employees" under Numerous Federal Statutes and the Common Law.

Darden argues at length that the common law test was developed only for determining when principals should compensate damages caused by their agents, and that it is ill suited for determining which service providers can legitimately claim benefits from the companies that engage them. (Respondent's Brief at 11-21) Those arguments are without foundation.

At common law, the definition of "servant" not only determines when principals are liable for torts committed by their agents, but also describes the class of agents to whom principals owe the duties of an employer toward an employee. *Restatement (Second) of Agency* § 2 cmt. a (1958). *See also* § 472 cmt. b; §§ 473-528 (1958). More importantly, whatever the origin of the common law definition may be, Congress has repeatedly used it to identify the class of workers protected by federal statutes governing the relationship between employers and employees. *See Kelley v. Southern Pac. Co.*, 419 U.S. 318, 323-24 (1974) (Federal Employers' Liability Act); *United States v. W.M. Webb, Inc.*, 397 U.S. 179, 186 (1970) (Social Security Act); *NLRB v. United Ins. Co.*, 390 U.S. 254, 256 (1968) (National Labor Relations Act). Darden offers

[7] Reference to "the remedial purposes of ERISA" is superfluous, since the common law test supplies an appropriate definition of "employee" without any modification. *See infra* at 12-13.

no explanation why Congress would consider the common law definition appropriate for those statutes but not for ERISA.

While Congressional intent alone is dispositive, the brief submitted by the United States demonstrates that the common law test is compatible with the purpose of ERISA and requires no modification. As the United States explains, the health plan participants in the most recent opinion letter of the Department of Labor "were employees of the clients because they were subject to the control of the clients," (Brief of United States at 9, discussing Op. Ltr. No. 91-17A), and the Department of Labor, exercising sensitivity to ERISA's purpose, "saw no reason to depart from" the conclusion dictated by the common law. (Brief of United States at 17) Exercising the same sensitivity, the United States also approves of *Professional & Executive Leasing, Inc. v. Commissioner*, 89 T.C. 225, 231-35 (1987), *aff'd*, 862 F.2d 751 (9th Cir. 1988), in which "the IRS successfully argued that professionals could not evade ERISA's minimum participation requirements . . . since under common law principles they were not employees of the leasing company . . . ." (Brief of United States at 9-10) No suggestion is made that consideration of ERISA's remedial purpose was necessary to, or even a part of, the reasoning that led either the IRS or the Tax Court to this conclusion, or that consideration of ERISA's remedial purpose was necessary for any court to reach an appropriate result in any other case.

On the contrary, the United States appears to approve (as it should) of the result in every case in which the common law test was correctly applied, and does not identify any circumstances under which ap-

plication of the common law test would frustrate ERISA's purpose.[8] In fact, it does not appear that the sensitivity to ERISA's purpose advocated by the United States would actually modify the common law test in any respect. The United States approves of the district court's approach in this case, because the court "assessed [the common law] factors in light of the 'total factual context.' " (Brief of United States at 24, quoting Pet. App. 50a) This is no modification of the common law test; it *is* the common law test as conventionally understood. *See NLRB v. United Ins. Co.*, 390 U.S. at 258 ("the total factual context is assessed in light of the pertinent common-law agency principles").

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[8] At pages 19-21, the United States' brief discusses *Wolcott v. Nationwide Mut. Ins. Co.*, 884 F.2d 245, 250 (6th Cir. 1989), *Holt v. Winpisinger*, 811 F.2d 1532, 1538 n.44 (D.C. Cir. 1987), *Plazzo v. Nationwide Mut. Ins. Co.*, No. 88-4016 slip op. (6th Cir. Dec. 22, 1989) (per curiam), *cert. denied*, ___ U.S. ___, 111 S. Ct. 370 (1990), *Mayeske v. International Ass'n of Fire Fighters*, 905 F.2d 1548, 1552 (D.C. Cir.), *cert. denied*, ___ U.S. ___, 111 S. Ct. 347 (1990), and *Penn v. Howe-Baker Eng'rs, Inc.*, 898 F.2d 1096, 1102 n.6 (5th Cir. 1990). It criticizes the result in *Penn* alone, noting, however, that "[t]he decision was probably erroneous under the common law test." (Brief of United States at 21 n.21) The United States observes that the other opinions do not "expressly restric[t]" their analysis to "whether the 'employer' had the right to control the 'employee' such that it would be proper to hold the 'employer' vicariously liable for torts committed by the 'employee'." (Brief of United States at 21 n.20) The opinions in *Wolcott*, *Holt*, *Plazzo* and *Mayeske* do, however, expressly apply the common law test without any hint that manipulation was necessary to reach the results that the United States apparently considers appropriate.

5. The Test Darden Advocates Would Make Determinations of Employee Status Less Predictable, Not More.

While the United States' brief shows that modification of the common law test is unnecessary, Darden's brief shows that it would be counter-productive. He claims that the common law test is unpredictable, but fails to note that his own authority attributes unpredictability to the very sort of result-oriented manipulation Darden now proposes:

> The explanation . . . seems to lie partly in the relative weight given to the various tests of status and partly in the extent to which courts define status in view of the purpose served by the particular legislation . . . .

(Respondent's Brief at 20, quoting A. Larson, *The Law of Workmen's Compensation* § 43.10 (1991))

Darden's attempt to shore up his claim by noting the reversal of district court decisions in *Holt v. Winpisinger*, 811 F.2d 1532 (D.C. Cir. 1987), and *Plazzo v. Nationwide Mut. Ins. Co.*, No. 88-4016 slip op. (6th Cir. Dec. 22, 1989) (per curiam), *cert. denied*, ___ U.S. ___, 111 S. Ct. 370 (1990) (unpublished opinion reprinted at Pet. App. 54a-58a), falters under the weight of exaggeration. Contrary to Darden's description, the reversal in *Holt* does not reflect disagreement on what result the common law test dictated; the district court acknowledged applicability of the common law test, but failed to elaborate and apply it. *Holt*, 811 F.2d at 1538-39. In *Plazzo*, the Sixth Circuit simply noted that the case was indistinguishable from another one decided by the court of appeals *after* the district court in *Plazzo* ruled. (Pet. App. 57a-58a) That a district court made a mistake before the court of appeals

issued its first instruction on employee status under ERISA hardly shows that the common law test is unpredictable in the Sixth Circuit (or anywhere else) now.

There are, of course, close cases with complex facts in which reasonable jurors or jurists could differ, but that degree of uncertainty is unavoidable when factual questions are involved, and it pales in comparison with the unpredictability of the test Darden advocates. In his view, " 'any individual' whose services are engaged" is or may become an employee. (*See* Respondent's Brief at 24) Because Darden's test narrows that class by focusing on investment decisions made by individual workers over the duration of their careers, it permits the employment status of individual workers to vary over time. His test would therefore make it difficult, if not impossible, for an employer to identify its employees prior to their retirement. That sort of unpredictability could prevent compliance with ERISA's funding, reporting, and disclosure requirements and is therefore clearly intolerable. Thus, Darden's arguments not only ignore Congressional intent embodied in the words of the statute, but also fail on their own terms to provide any policy justification for departure from the common law test.

CONCLUSION

For the foregoing reasons and those set forth in the Petitioner's Brief, the judgment of the court of appeals should be reversed and the case remanded with instructions to enter judgment for Nationwide.

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